

05-621 NOV - 7 2005

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

JACKSON RIP HOLMES,

Petitioner,

v.

VANDE MITZI SLACK AND JEANETTE KRISTINA
POSLER, as co-personal representatives of the
Estate of Jeanette VanDevere Holmes,

Respondents.

**On Petition For A Writ Of Certiorari
To The Oregon Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the petitioner was deprived of his Fifth Amendment right, not to be deprived of property, without due process of law, when the lower court refused to allow petitioner discovery of documents needed to prove embezzlement – by personal representatives of estate – of petitioner's inheritance, under circumstances where significant proof of the conversion was already admitted into evidence before the lower court.

II.

Whether the petitioner was deprived of his Fifth Amendment right, not to be deprived of property, without due process of law, when the lower court refused to allow petitioner discovery of documents, needed to prove good faith complaint, over conversion of petitioner's inheritance by co-personal representatives of estate – under circumstances where significant proof of the conversion was already admitted into evidence before the lower court – and instead imposed an assessment of \$47,000 in attorney fees award against petitioner, for filing claim which "had no objectively reasonable basis".

LIST OF PARTIES

The parties are Jackson Rip Holmes, petitioner, devisee of the Jeanette VanDevere Holmes Estate, and Vande Mitzi Slack and Jeanette Kristina Posler, respondents, devisees, and co-personal representatives, of the Jeanette VanDevere Holmes Estate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jackson Rip Holmes respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINION BELOW

The "Order Denying Review" of the Oregon Supreme Court appears as Appendix C. The "Affirmed Without Opinion" Order of the Oregon Court of Appeals appears as Appendix A. The Orders and Judgment of the Lane County Circuit Court, Probate Department, Eugene, Oregon, appear as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1257, subsection (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides:

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment of the United States Constitution provides:

"Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATEMENT OF THE CASE AND FACTS

This is an appeal from a probate proceeding in Lane County, Oregon.

Petitioner is the son of the decedent, Jeanette V. Holmes, who died on December 2, 2000. The respondents, who are the sisters of the appellant, are the co-personal representatives of the decedent's estate. Under decedent's Will most of her property went into a trust of which appellant and the respondents are the principal, and equal beneficiaries.

Petitioner was subjected to separate, non-estate, private, litigation, in Florida, in January, 2001, by the co-personal representatives, and learned through their Florida attorney's letter to the Florida Bar – Appendix D – that the attorney was being paid by petitioner's sisters with money earlier sent him by petitioner's mother, the decedent, for decedent's representation.

Petitioner filed a complaint about this with the Lane County, Oregon, Probate Court, along with a will contest, and a separate claim against the decedent's estate.

A trial was conducted about these matters in July, 2001, during which time petitioner introduced the respondents' – petitioner's sisters', co-personal representatives' – Florida lawyer's, letter to the Florida Bar admitting he and respondents agreed to use the decedent's money to

help the respondents – the petitioner's sisters, the Oregon estate's co-personal representatives – file private litigation against the petitioner in Florida. Petitioner testified respondents, through their private, Florida litigation, sought to wrongfully take Florida property belonging to him worth \$400,000.

Respondent Vande Mitzi Slack testified she had timely paid the Florida lawyer herself, and knew nothing of the decedent's money being used to fund her litigation against petitioner in Florida. Petitioner sought discovery of any and all records of such alleged payments, and alleged to the probate court that respondent Slack's testimony, contradicting Florida lawyer's written statement to the Florida Bar – Appendix D – was dishonest.

The Lane County, Oregon, Probate Court denied the petitioner access to the dispositive evidence – existence of necessary records of such alleged interstate payments by the respondent, to the Florida lawyer, contradicting his statement he was paid with decedent's/Estate's funds – , ruled that the respondents had done nothing wrong, and awarded attorney fees to them, against the petitioner, of \$47,000. Appendix B.

Respondent asserted this denial of access to evidence to prove perjury and conversion of estate assets by the respondents, to pay their Florida attorney to try to wrongfully take petitioner's \$400,000 Florida property away from him, violated his U.S. Constitutional right not to be deprived of property:

- his 1/3 interest in the decedent's/estate's funds held by the Florida lawyer,
- the \$47,000 attorney fee award,

- as well as ongoing efforts by the respondents to wrongfully take his Florida, and Oregon estate, property

without due process of law. Appendix D.

During the pendency of the probate case – Case No. 50-00-23921 – petitioner's attorney filed a motion for relief from judgment with the probate court, again seeking deposition and production of documents, relating to the foregoing decedent's retainer held by the Florida lawyer. Petitioner again introduced into evidence the Florida lawyer's written statement to the Florida Bar, stating that such money was used by the respondents – petitioner's sisters, co-personal representatives – in their private, non-estate, capacity, to file litigation against the petitioner in Florida.

Petitioner's attorney alleged that respondent Slack, in stating she knew nothing of such use of decedent's funds to pay her bill in suing petitioner in Florida, and that she timely paid her own bills, committed perjury, and sought deposition and production of documents relating to any necessary interstate payments by her to the Florida attorney. The probate court, without explanation, stated that the decedent's unused retainer to the Florida attorney was not an estate asset, and denied deposition and discovery, despite the outstanding \$47,000 attorney fee judgment, and petitioner's allegation the denial of discovery violated his U.S. Fifth Amendment right not to be deprived of property without due process of law.

The Lane County, Oregon, Probate Court, in the same case, one year later denied \$45,000 in later attorney fees to respondents' Oregon attorney, after petitioner showed these fees were not related to the Oregon estate, but

rather were respondents' private legal bills from their attorneys to pay for their continuing litigation in Florida, against petitioner, seeking to wrongfully take petitioner's \$400,000 Florida property away from him. Appendix B.

Petitioner appealed to the Oregon Court of Appeals, which "Affirmed Without Opinion", on April 13, 2005. Appendix A.

Petitioner appealed to the Oregon Supreme Court, petitioning for a review of the Oregon Court of Appeals' decision. The Oregon Supreme Court denied review on August 9, 2005.

Petitioner now prays for review by This Honorable United States Supreme Court.

REASONS FOR GRANTING THE PETITION

[Apology for sub-standard Petition due to Hurricane Wilma; promise to hire U.S. Supreme Court Bar Member Attorney if Certiorari granted.]

The petitioner, due to unforeseen problems caused by Hurricane Wilma, affecting attorneys with whom petitioner was consulting to prepare this petition, apologizes to This Honorable Court for inadequate preparation of this Petition. Petitioner's attorney, as well as U.S. Supreme Court Bar Members in Miami (as well as the Federal Courts) were forced to close their offices for several days during the key phase of legal research and writing of this Petition.

The petitioner, who has consulted with Florida attorneys Octavio Mestre, Esquire, Cesar Sordo, Esquire, Oregon attorney George Kelly, Esquire, and Florida U.S.

Supreme Court Bar Member Benjamin Kuehne, will, if Certiorari is granted by this Court, fully employ a learned U.S. Supreme Court Bar Member attorney, as his attorney, to represent him in any further proceedings. Title 18 U.S. Code Section 1001.]

Preliminary Legal Argument

Petitioner Jackson Rip Holmes is a "person" within the meaning of the Fifth and Fourteenth Amendments to the U.S. Constitution. 10 Wheat 66, 6 L.Ed. 268; *Western Turf Asso. v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520 (U.S.Cal. Feb. 25, 1907). "State procedures for creating and enforcing judgment liens are subject to the strictures of due process." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75, 56 USLW 4189 (U.S.Tex. Feb. 24, 1988). "A single creditor may maintain a bill against an administrator of a deceased debtor for a discovery of assets." *Hagan v. Walker*, 55 U.S. 29, 14 How. 29, 1852 WL 6771 (Mem.), 14 L.Ed. 312 (U.S.Ala. Dec. Term 1852).

"A creditor of a person deceased may go into equity for the discovery of assets and the payment of his debt, without first obtaining judgment at law." *Kendall v. Creighton (Green v. Creighton)*, 23 How. 90, 16 L.Ed. 419. "Equity has jurisdiction of a bill for discovery, and to set aside a fraudulent transfer of stock made to escape liability as a stockholder; and to enforce the liability of the transferor." *Bowden v. Johnson (Adams v. Johnson)*, 107 U.S. 251, 17 Otto 251, 2 S.Ct. 246, 27 L.Ed. 386 (U.S.N.J. Mar. 05, 1883). "Attorney-client privilege, did not bar discovery of statements actually made by a clothing corporation's counsel, orally or in writing, to prospective

purchasers of the corporation; the corporation was represented in the instant litigation by a different law firm, and counsel's role in the litigation had been peripheral at best." *Calvin Klein Trademark Trust v. Wachner*, 124 F.Supp.2d 207 (S.D.N.Y. Dec. 20, 2000).

The Appellant's Briefs before the Oregon Court of Appeals and Oregon Supreme Court make the legal arguments that there was no basis for denying discovery of the Florida attorneys billing records and/or any payments of those bills by the respondents (billing records, much less payments of bills, are not protected by privilege), and those legal arguments are incorporated herein by reference, and available to the Court upon inspection or request.

"Court would allow mortgage re-purchaser opportunity to conduct discovery before determining if corporation could be liable for appraiser's allegedly fraudulent conduct; . . . depending on facts to be developed, . . . liability could be established . . ." *Superior Bank, F.S.B. v. Tandem Nat. Mortg., Inc.*, 197 F.Supp.2d 298 (D.Md. May 09, 2000), adhered to on denial of reconsideration.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A PROBABLE CONFLICT OF CIRCUITS OVER THE U.S. CONSTITUTION FIFTH AMENDMENT RIGHT, NOT TO BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN FACT PATTERNS SIMILAR TO THE INSTANT CASE.

In *Hoffman v. Lehman*, 926 F.Supp. 510 (USDC PA, 1996), the Court denied summary judgment, holding that discovery needed to proceed, to see if fraud could be

established to protect substantive due process rights of the plaintiff.

In *Ingalls Shipbuilding, Inc. v. United States*, 13 Cl.Ct. 757 (1987), the Court allowed discovery as a due process right.

Other federal cases have held to the contrary – see, e.g., *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626 (N.D. Cal. 1978).

Therefore there appears to be a conflict of the Circuits over the fact issues involved in the instant case – petitioner's claim he has been deprived of property, in violation of his due process right to the evidence, proving his claim of conversion of estate assets by the respondents – giving rise to a need for reconciliation of Circuit rulings, by This Honorable Court.

II. GRANTING CERTIORARI IN THIS CASE WOULD ALLOW THE COURT, POST-KELO V. CITY OF NEW LONDON, TO REASSURE CONCERNED PARTIES OF ITS COMMITMENT TO FIFTH AMENDMENT DUE PROCESS PROTECTION OF INDIVIDUAL PROPERTY RIGHTS.

This Court recently decided the case of *Kelo v. City of New London, Conn.*, 125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Env'tl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437 (U.S.Conn. Jun. 23, 2005), in which the City of New London was allowed to take private property, by eminent domain, for public use, including use by private developers. The latter fact aroused concern in some quarters that constitutional protections for private property owners are being eroded by the Court.

Granting Certiorari in this case would allow The Honorable Supreme Court to reassure concerned parties that its holding in the *Kelo* case was limited to special circumstances involved therein, and is not a retreat on its commitment to the Fifth Amendment protection of U.S. citizens' right not to be deprived of property without due process of law.

III. GRANTING CERTIORARI IN THIS CASE PROTECTS MILLIONS OF U.S. CITIZENS OTHERWISE UNPROTECTED FROM INTERSTATE CONVERSION OF THEIR ASSETS.

Petitioner's experience has been that when interstate conversion of assets occurs, State authorities often feel they lack jurisdiction to fully address such interstate activities. Federal law enforcement authorities, a backup recourse for enforcement of prohibitions against interstate conversion, usually have a high dollar threshold amount required before expending federal law enforcement funds to investigate. This leaves the average U.S. citizen, victimized by interstate conversion, not addressed by state courts, and, in amounts which are catastrophic to the individual, but insufficient for federal law enforcement, without legal protection against such interstate conversion, even if ongoing.

Granting Certiorari in this case would protect literally millions of U.S. citizens around the country against interstate conversion, by sending a message that interstate conversion against individuals is not a "loophole" in our jurisprudence which predators can freely exploit, because if state courts cannot or will not address it, and federal law enforcement does not see enough money involved, there are nonetheless courts which will protect

the United States' 270,000,000 citizens from this interstate conversion.

CONCLUSION

For the foregoing reasons, and with apology for inadequate legal research and argumentation due to Hurricane Wilma, petitioner respectfully prays that Certiorari will be granted, demonstrating the Court's resolve to reconcile conflicts of circuits, and protection, post-*Kelo*, of U.S. citizens' property rights.

Respectfully submitted,

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APPENDIX A

DECISION OF THE OREGON COURT OF APPEALS

FILED: April 13, 2005

**IN THE COURT OF APPEALS
OF THE STATE OF OREGON**

In the Matter of the Estate of	)	Lane County Circuit,
Jeanette Van Devere Holmes	)	Court No. 50-00-23921
JACKSON RIP HOLMES,)	
	)	A122307
Appellant,)	
)	
v.)	
)	
VANDE MITZI SLACK, aka)	
Vande Holmes Slack, JEANETTE)	
KRISTINA POSLER, co-personal)	
representatives of the Estate of)	
Jeanette Van Devere Holmes,)	
Respondents.)	

Lauren S. Holland, Judge

Argued and submitted: January 24, 2005

Before Landau, Presiding Judge, and Armstrong, Judge,
and Leeson, Judge pro tempore

Attorney for Appellant: George W. Kelly

Attorney for Respondents: William Cohnstaedt

AFFIRMED WITHOUT OPINION

**DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS**

Prevailing party: Respondents

☐ No costs allowed.

☒ Costs allowed, payable by: Appellant

**APPELLATE JUDGMENT
and
SUPPLEMENTAL JUDGMENT**

APPENDIX B
DECISIONS OF THE LANE COUNTY
PROBATE COURT
IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR LANE COUNTY
PROBATE DEPARTMENT

In The Matter Of the Estate of
JEANETTE VAN DeVERE HOLMES,
Deceased.

Case No. 50-00-23921

OPINION
AND ORDER

(Filed Aug. 3, 2001)

THIS MATTER came on before the Court for trial July 17, 18, 19, 20, 24, 25 and 26, 2001. The Estate and co-personal representatives appeared in person and by attorney William Cohnstaedt. The contestant, Jackson Rip Holmes, appeared pro se.

The first issue in this case is whether Jeanette Van DeVere Holmes had the requisite testamentary capacity when she executed her will on April 8, 1993, and the two codicils dated October 16, 1995 and July 16, 1997. The Preponderance of evidence clearly establishes that the decedent understood what she was doing and the effect it would have, and possessed testamentary capacity at the time she executed the documents. Therefore, the Court finds that Jeannette Van DeVere Holmes had the requisite testamentary capacity and the contest to the will is denied.

The second issue in this case is whether Jeanette Van DeVere Holmes committed fraud in mismanagement of the real property in Coral Gables, Florida. There is no allegation or proof that a presentation of a claim was ever made

to the co-personal representatives of the estate. Under *Balthrop v. Berryman*, 96 Or App 354 (1989) it is absolutely necessary to allege that a claim was presented to the Estate and denied. The Amended Petition does not allege facts sufficient to state a claim on this issue. However, the Court is aware of the due process requirements of *Tulsa Professional Collection Services v. Pope*, 485 US 478, 108 S Ct 1340, 99 L Ed2d 565, and the amendments the case prompted to the Oregon Revised Statutes. The Court also recognizes that the contestant is pro se (although a graduate of a respected law school) and has allowed the contestant to proceed on a Summary Determination of this claim under ORS 115.165. The Court has had an opportunity to view the demeanor of the witnesses and judge their credibility, which is an important consideration in its conclusions. The Court disallows the claim in whole.

The third issue is whether the current co-personal representatives have converted or misused funds belonging to the estate, specifically, a non-refundable \$7500 retainer paid to the Florida law firm of Phillips, Eisinger, Koss, Rothstein & Rosenfeldt by the decedent prior to her death. Although there is mention in an exhibit that the law firm offered to credit the retainer to Florida litigation wherein the co-personal representatives are defendants, there is no evidence that such a credit actually occurred. To the contrary, Vande Holmes Slack testified she had paid her own legal expenses in the Florida litigation. Also, it is questionable whether the \$7500 non-refundable retainer could constitute an asset of the estate. Therefore, this claim is denied.

Counsel for co-personal representatives shall prepare the Judgment.

5a

SIGNED this 3 day of August, 2001.

/s/ Lyle C. Velure
LYLE C. VELURE, Circuit Judge

IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR LANE COUNTY

Estate of:

JEANETTE VAN DEVERE HOLMES,

Deceased.

Date of Death: December 2, 2000.

Case No. 50-00-23921

ORDER AND
OPINION ON
ATTORNEY FEES

This matter comes before the Court on the Estate of Jeanette Vendevere Holmes's petition for attorney fees pursuant to ORS 20.105(1). The Court conducted a hearing under ORCP 68C to determine whether attorney fees are appropriate. The Court has heard testimony and argument, and has reviewed all documents presented to the Court, including Exhibit 24, the video presented by Contestant Holmes of the subject property.

In 1995, the legislature amended ORS 20.105(1) to require the Court to award attorney fees on a finding that the asserted claim had no objectively reasonable basis. Previously, the Supreme Court set forth a three part test that the trial court must apply in determining whether attorney should fees should be awarded under ORS 20.105(1). *Mattiza v. Foster*, 311 Or 1, 803 P2d 723 (1990). Because the 1995 amendment merely changed an award of attorney fees from a discretionary function to a mandatory function, the *Mattiza* criteria are still valid. These criteria are: (1) the party claiming attorney fees must have been the prevailing party; (2) there must be a finding of meritless to the claim; and (3) the claim must have been pursued for an improper purpose (311 Or at 7-9). The Court analyzed this case in light of those criteria.

The Estate was the prevailing party in this litigation (see the Court's Opinion and Order of August 3, 2001).

Secondly, the Court finds that Contestant's claims had no merit whatsoever. As the Court pointed out in its Opinion, there was no evidence that the \$7500 non refundable attorney fee was used as Contestant claims. The evidence is uncontradicted that the Florida attorney fee paid by the decedent prior to her death was non refundable and that Vande Slack Holmes paid her own attorney fees in the Florida litigation. The only evidence presented was that the Florida law firm offered to give the personal representatives a credit for the fee, however, there is no evidence in the record that such ever occurred.

The claims that the decedent mismanaged the property have no basis because the decedent was the sole income beneficiary of the trust concerning the property. Contestant presented such evidence into the record, showing that any harm to the property occurred solely to the decedent and not the residual beneficiaries. Contestant's allegations about mismanaged property have no bearing on the residual beneficiaries.

Contestant's other claim that Mrs. Holmes did not possess testamentary capacity is also without a basis. The only evidence presented was Contestant's assertions that Mrs. Holmes thought he had a mental illness. This certainly is not a basis for a claim of lack of testamentary capacity.

Third, the Court must now explore the issue of whether Contestant acted with an improper purpose. The Court makes this finding not only on the evidence received but on its ability to observe the demeanor of the witnesses and judge their credibility. It is clear to this Court that

Contestant is using litigation in an attempt to intimidate his sisters into bending to his will and desires to manage the real property in question for his own personal gain (e.g., paragraph 93 in Contestant's Response (#136) filed with the Court on November 5, 2001). This Court concludes that the only purpose of Contestant in asserting these claims is for the improper purpose of intimidating his sisters into granting him full control over the property.

Therefore, the Court is of the opinion that the Estate's claim for attorney fees under ORS 20.105(1) meets the criteria as set forth in *Mattiza*.

The Court must now address the reasonableness of the attorney fees requested. In determining the amount of attorney fees, the Court reviewed each requested amount under ORS 20.075. Among the considerations listed in that statute is the party's conduct giving rise to the litigation. Because the Court has found that Contestant's motivation for raising these claims constitutes bad faith, the Court is justified in awarding attorney fees.

ORS 20.075(1)(e) permits the Court to take into consideration the reasonableness and diligence of the parties during the proceedings. The Estate's counsel has been involved with this case since December 2000. Due to the nature and extent of involvement with this case, the Court finds that counsel for the Estate was impaired in his ability to accept other cases. Further, evidence presented on the record shows that the counsel for the Estate charged reasonable fees, according to the fees customarily charged for such legal services. These factors, as outlined in ORS 20.075, provide the basis for the Court's award of \$47,542.50 in attorney fees. The Estate should not be responsible to pay for this litigation.

ORS 20.105 provides only for attorney fees, but not costs or distributions. Under this statute, the Estate is not entitled to recover the costs of Gretchen Morris's expert testimony. Nor can the Estate recover the costs of any witness fees because counsel for the Estate neglected to include such costs and distributions in his Statement of Costs. Simply listing the costs within the accounting for attorney fees is insufficient. The Court deducted all costs from the counsel's attorney fee statement, thereby arriving at the figure \$47,542.50.

Finally, the Court is granting the prevailing Party fee under ORS 20.190(2)(B). As the prevailing party in a judgment issued then the claims were already tried, the Estate is entitled to recover \$500. The Court also awards the Estate the prevailing of \$5000 pursuant to ORS 20.190(3). The award is based on the following factors: Contestant's bad faith in raising these allegations, the fact the claims have no merit, and the involvement of counsel for the Estate in litigating the claims.

Mr. Cohnstaedt may prepare a judgment consistent with this order. UTCR, Rule 5.100 requires Mr. Cohnstaedt to mail a copy of the proposed judgment to Contestant not less than seven days prior to its submission to the Court. This judgment shall reflect the Court's ruling in the order of August 3, 2001 and this order.

SIGNED this 6 day of November, 2001.

/s/ Lyle C. Velure
LYLE C. VELURE, Circuit Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

Estate of:	) Case No. 50-00-23921
JEANETTE VAN	) JUDGMENT:
DEVERE HOLMES,	) 1. Will Contest
Deceased.	) 2. Claims Against Estate
	) 3. Petition to Remove Co-
Date of Death:	) Personal Representatives
December 2, 2000.	) 4. For \$53,042.50 to Estate
	) Against Jackson Rip Holmes
	) (Filed Nov. 29, 2001)

The will contest, claims against the estate, and Petition to Remove Co-Personal Representatives came on before the Court for trial July 17, 18, 19, 20, 24, and 25, 2001. The Estate and Co-Personal Representatives appeared in person and by attorney William Cohnstaedt. The contestant, Jackson Rip Holmes, appeared pro se.

The Court makes the following findings:

1. The first issue in this case is whether Jeanette Van Devere Holmes had the requisite testamentary capacity when she executed her will on April 8, 1993, and the two codicils dated October 16, 1995, and July 16, 1997. The preponderance of evidence clearly establishes that the decedent understood what she was doing and the effect it would have, and possessed testamentary capacity at the time she executed the documents.
2. The second issue in this case is whether Jeanette Van Devere Holmes committed fraud in mismanagement of the real property in Coral Gables, Florida. There is no allegation or proof that a presentation of a claim

was ever made to the Co-Personal Representatives of the estate. Under *Balthrop v. Berryman*, 96 Or pp 354 (1989) it is absolutely necessary to allege that a claim was presented to the Estate and denied. The Amended Petition does not allege facts sufficient to state a claim on this issue. However, the Court is aware of the due process requirements of *Tulsa Professional Collection Services v. Pope*, 485 US 478, 108 S Ct 1340, 99 L Ed2d 565, and the amendments the case prompted to the Oregon Revised Statutes. The Court also recognizes that the contestant is pro se (although a graduate of a respected law school) and has allowed the contestant to proceed on a Summary Determination of this claim under ORS 115.165. The Court has had an opportunity to view the demeanor of the witnesses and judge their credibility, which is an important consideration in its conclusions.

3. The third issue is whether the current Co-Personal Representatives have converted or misused funds belonging to the estate, specifically, a non-refundable \$7500 retainer paid to the Florida law firm of Phillips, Eisinger, Koss, Rothstein & Rosenfeldt by the decedent prior to her death. Although there is mention in an exhibit that the law firm offered to credit the retainer to Florida litigation wherein the Co-Personal Representatives are defendants, there is no evidence that such a credit actually occurred. To the contrary, Vande Holmes Slack testified she had paid her own legal expenses in the Florida litigation. Also, it is questionable whether the \$7500 non-refundable retainer could constitute an asset of the estate.
4. The fourth issue came before the Court on the Estate of Jeanette Van Devere Holmes' petition for attorney fees pursuant to ORS 20.105(1). The Court conducted hearings on October 10 and October 31, 2001, under ORCP 68C to determine whether attorney fees are appropriate. The Court has heard testimony and

argument, and has reviewed all documents presented to the Court, including Exhibit 24, the video presented by Contestant Holmes of the subject property. The Court makes the following specific findings on the attorney fee issue:

- A. The Court finds that the Estate was the prevailing party in this litigation.
- B. The Court finds that Contestant's claims had no merit whatsoever. As the Court pointed out previously, there was no evidence that the \$7500 non-refundable Attorney fee was used as Contestant claims. The evidence is uncontradicted that the Florida attorney fee paid by the decedent prior to her death was non-refundable, and that Vande Holmes Slack paid her own attorney fees in the Florida litigation. The only evidence presented was that the Florida law firm offered to give the Co-Personal Representatives a credit for the fee; however, there is no evidence in the record that such ever occurred.
- C. The Court finds that the claims that decedent mismanaged the property have no basis because the Contestant was not an income beneficiary of the trust property and had no right to income concerning the decedent's property. Contestant presented such evidence into the record, showing that any harm to the property occurred solely to the decedent and not the residual beneficiaries. Contestant's allegations about mismanaged property have no bearing on the residual beneficiaries.
- D. The Court finds Contestant's other claim that Mrs. Holmes did not possess testamentary capacity is also without a basis. The only evidence presented was Contestant's assertions that Mrs.

Holmes thought he had a mental illness. This certainly is not a basis for a claim of lack of testamentary capacity.

5. The Court must now explore the issue of whether Contestant acted with an improper purpose. The Court makes this finding not only on the evidence received but on its ability to observe the demeanor of the witnesses and judge their credibility. It is clear to this Court that Contestant is using litigation in an attempt to intimidate his sisters into bending to his will and desires to manage the real property in question for his own personal gain (e.g., paragraph 93 in Contestant's Response [#136] filed with the Court on November 5, 2001). This Court finds that the only purpose of Contestant in asserting these claims is for the improper purpose of intimidating his sisters into granting him full control over the property. Therefore, the Court is of the opinion that the Estate's claim for attorney fees ORS 20.105(1) meets the criteria as set forth in *Mattiza*.
6. The Court must now address the reasonableness of the attorney fees requested. In determining the amount of attorney fees, the Court reviewed each requested amount under ORS 20.075. Among the considerations listed in that statute is the party's conduct giving rise to the litigation. Because the Court has found that Contestant's motivation for raising these claims constitutes bad faith, the Court is justified in awarding attorney fees.

ORS 20.075(1)(c) permits the Court to take into consideration the reasonableness and diligence of the parties during the proceedings. The Estate's counsel has been involved with this case since December 2000. Due to the involvement with this case, the Court finds that counsel for the Estate was impaired in his ability to accept other cases. Further, evidence

presented on the record shows that the counsel for the Estate charged reasonable fees, according to the fees customarily charged for such legal services. These factors, as outlined in ORS 20.075, provide the basis for the Court's award of \$47,542.50 in Attorney fees. The Estate should not be responsible to pay for this litigation.

7. ORS 20.105 provides only for attorney fees, but not costs or distributions. Under this statute, the Estate is not entitled to recover the costs of Gretchen Morris's expert testimony. Nor can the Estate recover the costs of any witness fees because counsel for the Estate neglected to include such costs and distributions in his Statement of Costs. Simply listing the costs within the accounting for attorney fees is insufficient. The Court deducted all costs from the counsel's attorney fee statement, thereby arriving at the figure \$47,542.50.

Finally, the Court is granting the prevailing party fee under ORS 20.190(2)(B). As the prevailing party in a judgment issued after the claims were already tried, the Estate is entitled to recover \$500. The Court also awards the Estate the prevailing fee of \$5000 pursuant to ORS 20.190(3). The award is based on the following factors: Contestant's bad faith in raising these allegations, the fact the claims have no merit, and the involvement of counsel for the Estate in litigating the claims.

WHEREFORE, having heard the evidence presented by the witnesses, reviewed the written and video record, and received the oral and written arguments, and thus being fully informed,

THE COURT NOW ORDERS AND JUDGES AS FOLLOWS:

1. Jackson Rip Holmes' contest to the will is denied and dismissed with prejudice. Decedent's will as amended is admitted to probate.
2. Jackson Rip Holmes' claim. the money damages against the Estate is disallowed in its entirety.
3. Jackson Rip Holmes' claim that the Co-Personal Representatives converted or misused funds belonging to the Estate is denied in its entirety.
4. The Estate is awarded a money judgment against Jackson Rip Holmes as follows:

MONEY JUDGMENT PURSUANT TO ORCP 70A

1. Judgment Creditor: Estate of Jeanette Van Devere Holmes
2. Judgment Creditor's Attorney: William Cohnstaedt,
561 NW Jackson,
Corvallis, OR 97330;
Tel. (541) 757-9944
3. Judgment Debtor: Jackson Rip Holmes,
7611 Harding Ave.,
Apt. 3, Miami Beach,
FL 33141; SSN 265-82-
6709 DOB 04/11/1951;
FL driver's lic. # _____
4. Judgment Amount:

(Total)	\$53,042.50
(Attorney Fees)	\$47,542.50
5. Prejudgment Interest: None
6. Costs: None
7. Prevailing Party Fee:

ORS 20.190(2)(B)	\$500.00
ORS 20.190(3)	\$5000.00
8. Arbitrator Fee: None

9. Post judgment Interest: Nine percent (9%) per annum simple interest on the first day of each month commencing the first day of the first month following the date of the judgment.

DATED this 29 day of November, 2001.

/s/ Lyle C. Velure
Judge Lyle C. Velure
Circuit Court of the
State of Oregon for Lane County

APPROVED AS TO FORM:

Date: _____, 2001

Jackson Rip Holmes

SUBMITTED BY:
William Cohnstaedt,
OSB #79025
Attorney for Co-Personal
Representatives

**CO-PERSONAL
REPRESENTATIVES:**
Jeanette Kristina
(Holmes) Posler and
Vande Holmes Slack
c/o 561 NW Jackson Street,
Corvallis, OR 97330

James M. O'Kief, OSB #78326
 Morris & O'Kief
 400 Country Club Road, Suite 360
 Eugene, Oregon 97401
 344-4010

IN THE CIRCUIT COURT
 OF THE STATE OF OREGON
 FOR THE COUNTY OF LANE

In the Matter	) No. 50-00-23921
of the Estate of:)
JEANETTE VANDEVERE	) JUDGMENT APPROVING
HOLMES,	) FIRST, SECOND AND
	) FINAL ACCOUNT;
Deceased.	) AND, DECREE OF
	) FINAL DISTRIBUTION
	) (Filed Jul. 18, 2003)

THE CO-PERSONAL REPRESENTATIVES having submitted the final accounting herein and requested approval of same, and for decree of final distribution, and the devices, Jackson Rip Holmes, having submitted certain objections thereto primarily pertaining to the attorney fee issue, and the Court having conducted a hearing on June 11 and 12, 2003, and having reviewed exhibits, and heard testimony, the co-personal representatives having appeared personally and by and through their attorney, William Cohnsteadt, and Mr. Holmes having appeared personally and by and through his attorney, James M. O'Kief, and the Court being otherwise fully advised in the premises herein:

THE COURT'S FINDINGS OF FACTS AND RULINGS ARE SET FORTH IN EXHIBIT "A" attached hereto

and by this reference incorporated herein and made in part hereof.

AND FURTHER, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court approves the final accounting and all interim accountings filed herein;

2. The Court orders payment to the co-personal representatives the sum of \$34,803.75 to be divided between them;

3. The Court approves payment of attorney fees for administering the estate of Jeanette Van Devere Holmes and for payment of same to attorney William Cohnstaedt in the sum of \$88,000;

4. The Court directs the payment of all unsatisfied claims specifically accepted by the co-personal representatives, all taxes, and all costs, and expenses of administration of the estate of Jeanette Van Devere Holmes by the Jeanie Holmes' Trust denied April 8, 1993, as modified October 15, 1995, and July 16, 1997; Vandy Holmes Slack, Jeanette Holmes Posler and Wells Fargo Bank, Co-Trustee, per the instructions contained in the trust and will;

5. The Court directs payment to attorney John R. Cady in the amount of \$4,254.85;

6. The Court directs distribution of the remaining assets of the estate to the Jeanie Holmes' Trust, Vandy Holmes Slack, Jeanette Holmes Posler, and Wells Fargo Bank, Co-Trustees, which is entitled to the assets as set forth in the inventory;

7. A supplemental request for attorney fees may be submitted by William Cohnstaedt for time experienced in winding up the final closing estate matters.

8. On filing the appropriate receipts showing distribution and disbursements as set forth herein, the court will issue an Order closing the estate, discharging the Co-Personal Representatives, and exonerating the co-personal representatives' bond;

Dated this 18 day of July, 2003.

/s/ Lauren S. Holland
LAUREN S. HOLLAND
CIRCUIT JUDGE

Submitted by:

James M. O'Kief
Attorney for Devisee
Jackson Rip Holmes
400 Country Club Road, Suite 350
Eugene, Oregon 97401
344-4010

APPENDIX C
DECISION OF THE OREGON SUPREME COURT
IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Estate of	)	Lane County Circuit
Jeanette Van Devere Holmes,	)	Court No. 50-00-23921
JACKSON RIP HOLMES,)	
Appellant,)	
Petitioner on Review,)	
v.)	
VANDE MITZI SLACK,	)	SC S52504
a.k.a. Vande Holmes Slack,	)	CA A122307
JEANETTE KRISTINA)	
POSLER, co-personal)	
representatives of the)	
Estate of Jeanette)	
VanDevere Holmes,)	
Respondents,	)	ORDER DENYING
Respondents on Review.	)	REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Dated this 9th day of August 2005.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
 CHIEF JUSTICE

c: George Kelly
 William Cohnstaedt

APPENDIX D
EXCERPTS FROM COURT RECORD
IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF LANE

Estate of:	:	Case No. 50-00-23921
JEANETTE VANDEVERE	:	
HOLMES,	:	
Deceased.	:	October 4, 2001
Date of Death:	:	
December 2, 2000	:	

BENEFICIARY JACKSON RIP HOLMES'
MOTION TO RECONSIDER ORDERS OF
OCTOBER 16, 2001 DENYING JUDICIAL
VISIT TO SUBJECT PROPERTY AND, AS TO
WITNESSES, AND MOTION TO STRIKE
ORDER AS TO WITNESSES AS NO MOTION
WAS EITHER MADE OR REQUIRED TO
EXERCISE THIS CONSTITUTIONAL RIGHT

COMES NOW beneficiary Jackson Rip Holmes and moves the Court to reconsider its Orders of October 16, 2001 denying HOLMES' informal motion to visit the Florida property which is central to the claims filed by HOLMES and its *sua sponte* refusal to accept witnesses which HOLMES may seek to proffer (Holmes made not motion to have his due process right to put on witnesses since this right cannot properly be denied by a Judge), as is more fully set forth as follows:

1. The facts and reality of this case, along with the life and the Estate and Trust of Jeanette V. Holmes, are located at least half in the State of Florida.

2. Jeanette V. Holmes spent half her life in South Florida, and received the overwhelming majority of her life's income from property located in Coral Gables, Florida, including the three Jeanie Holmes' Trust stores located on Miracle Mile in Coral Gables.

* * *

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF LANE

Estate of:	: Case No. 50-00-23921
JEANETTE VANDEVERE	:
HOLMES,	:
	:
Deceased.	: November 19, 2001
Date of Death:	:
December 2, 2001	:
	:

BENEFICIARY JACKSON RIP HOLMES'
NOTICE OF INTENT TO APPEAL THE
COURT'S RULING AS TO TYPE OF CLAIM
PROCEEDING APPROPRIATE - HOLMES'
POSITION IS THAT HE WAS ENTITLED TO
FULL CLAIM PROCEEDING WITH FULL
RIGHT OF APPEAL - AND OTHER LEGAL
OBJECTIONS INCLUDING FEDERAL
QUESTION CONCERNING DEPRIVING
HOLMES OF PROPERTY RIGHTS AS TO
AND TO AND AS AFFECTED BY ANY
PARTIAL DISTRIBUTION, AND MOTION
FOR ENLARGEMENT OF TIME

COMES NOW beneficiary Jackson Rip Holmes, J.D. and gives notice of his intent to specifically appeal the denial of his right to fully present his claims against the Estate with full right of appeal. HOLMES also raises other legal objections to partial distribution including raising the federal question that HOLMES is being denied his right to the money involved and the property rights which will be affected by these legal fees being used against his property rights without due process of law, and moves for enlargement of time to further present these issues, as is more fully set forth as follows:

1. The case law does not support the position that HOLMES' claims against the Estate should be limited to the minor review the court allowed, but rather that HOLMES should have been

* * *

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF LANE

Estate of:	:	Case No. 50-00-23921
JEANETTE VANDEVERE	:	
HOLMES,	:	
	:	
Deceased.	:	April 17, 2002
Date of Death:	:	
December 2, 2000	:	

BENEFICIARY JACKSON RIP HOLMES'
MOTION TO RECONSIDER, FOR ORAL
ARGUMENT, FOR CLARIFICATION, RAISING
OF FEDERAL QUESTION, AND FOR
ENLARGEMENT OF TIME TO COMPLETE
THIS MOTION AND TO ENLIST
REPRESENTATION AS TO VARIOUS
ASPECTS OF ORDER OF ORDER OF APRIL 9,
2002 (BENEFICIARY AGREES TO
HEARING OF MAY 20, 2002)

COMES NOW beneficiary Jackson Rip Holmes and agrees to the Hearing set for May 20, 2002, but moves for reconsideration of part of, for clarification of part of, moves for oral argument as to part of, raises federal questions as to part of, *and* moves for enlargement of time to complete this motion and to enlist counsel for representation as to part of the Order of April 9, 2002, as is more fully set forth as follows:

1. Beneficiary HOLMES agrees to the Order insofar as it sets matters for hearing in May, and thanks the Court for so doing.

2. Beneficiary HOLMES moves the court to reconsider and moves for oral argument on – at the May, 2002 hearing the issue of distribution of Auction Proceeds.

3. Beneficiary Holmes alleges that the Auction proceeds are one-third his according to the provisions of the deceased's

* * *

**PHILLIPS, EISINGER, KOSS,
ROTHSTEIN & ROSENFELDT, P.A.
Attorneys at Law**

[Address And Telephone Omitted In Printing]

April 26, 2001

VIA FEDERAL EXPRESS

Barry W. Rigby
Chief Branch Disciplinary Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 835
Ft. Lauderdale, Florida 33309

Re: Complaint of Jackson Rip Holmes
TFB File No. 2001-51,266 (17G)

Dear Mr. Rigby:

This letter is in response to your April 9, 2001 letter advising that you were reopening the above-referenced file and requesting that I provide you additional information in connection with the allegations made against me by Jackson Rip Holmes.

First, I think it is important to point out that the undersigned and Phillips, Eisinger, Koss, Rothstein &

Rosenfeldt, P.A. represent Mr. Holmes' sisters, Vande Slack and Jeanette Posler, in an action brought against them for construction of an underlying trust document pending before Circuit Court Judge Arthur Rothenberg in Miami-Dade County, Florida. The trustee filed the action after Mr. Holmes refused to accept a $\frac{1}{6}$ share in the trust assets (real property located in Miami-Dade County), instead insisting upon a $\frac{1}{6}$ share. See, Exhibit "D" to Complaint for Construction of Trust Instrument.

The issue initially brought before Judge Rothenberg, essentially, is whether the distribution of the trust assets will be per stripes or per capita. Since Mr. Holmes and his two sisters have an interest through their late mother, they will ultimately each receive the same share in the trust property. Mr. Holmes, due largely to his intransigence and refusal

* * *

of the property pursuant to §64.071, Florida Statutes." Mr. Van Devere made similar allegations in his Answer to Cross-Claim for Partition and Motion for Private Sale.

More recently, Mr. Holmes advised the undersigned that he believes the responsibility for what he deems to be the "false" allegations lies with Ms. Posler and Ms. Slack and Oregon attorney William Cohnstaedt, against whom he has already filed numerous complaints. The attorney-client privilege prevents me from providing information about communications between me and my clients.

2. The second issue you have asked me to address relates to Mr. Holmes' allegation that I failed to provide him with notice of a scheduled hearing before Judge Rothenberg. A copy of the Notice of Hearing, with a Certificate of Service, indicating it was mailed to Mr. Holmes

has been enclosed for your review. Also enclosed please find an Affidavit from my legal assistant, Tracey Young, attesting that she mailed Mr. Holmes a copy of the subject notice.

Notwithstanding his claim that I failed to provide him notice of the hearing, Mr. Holmes attended the hearing before Judge Rothenberg, along with his three "legal advisors," entourage of real estate experts and witnesses and even a handpicked court reporter. Obviously, Mr. Holmes had notice of the hearing and was not, in anyway, prejudiced. Mr. Holmes, in fact, raised the claim of no notice with Judge Rothenberg, who has not made any findings with regard to that matter.

3. I can unequivocally state that Mr. Holmes' sisters have not paid us with funds which do not belong to them. In order to prevent allegations that I have somehow been less than candid with The Florida Bar, be advised that we were originally retained by Mr. Holmes' late mother, Jeanette Holmes, and received a non-refundable retainer from her. Once Ms. Holmes passed away, Ms. Posler and Ms. Slack retained the Firm to represent them. As a courtesy, we agreed to apply the remaining retainer to legal fees incurred in representing them.³

* * *

³ Mr. Holmes has also raised this matter before Judge Rothenberg via his Motion to Require Attorney Joel Frankel to Disclose Who is Paying his Fee, as it Appears his Attorneys Fees may be Improperly Converted/Embezzled from the Jeanne Holmes' Trust in which he alleged the financial condition of his sisters: "Clients Jeanette Posler and Vande Slack have no apparent means to pay such legal fees of Philips [sic], Eisinger, et al. having -- at this pleading is accompanied by the sworn Affidavit of the pleader Jackson Rip HOLMES, J.D. -- been virtually unable to make even incidental, let alone major . . .

matters, is improperly utilizing the disciplinary system as a strategic litigation tool. In light of the above, I request that Mr. Holmes' complaint be dismissed pursuant to Rule 3-7.3, Rules Regulating the Florida Bar.

If you require any additional information, please do not hesitate to contact me.

Sincerely,

/s/ Jed L. Frankel
Jed L. Frankel

JLF/ty
Enclosures

cc: Gary S. Phillips, Esq.
Scott Rothstein, Esq.
Jackson Rip Holmes
